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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC., *Respondent.*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION BY CASE-SWAYNE CO., INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1157

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC., *Respondent.*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION BY CASE-SWAYNE CO., INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to paragraph 4, rule 24, Rules of the Supreme Court of the United States, the petitioner replies to respondent's brief in opposition to petitioner's petition for writ of certiorari to the United States Court of Appeals For The Ninth Circuit.

I

Sunkist does not deny the tremendous importance of the question presented by the petition for writ of certiorari. Sunkist could hardly do so. In Sunkist's petition for writ of certiorari in the *Winckler* case [1] (which was granted)

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[1] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

to have this Court determine the confines within which a cooperative may act collectively Sunkist stated:

> "There are literally thousands of agricultural cooperatives in this country, having an aggregate membership in excess of 7 million farmers engaged in growing and producing a very large part of the agricultural produce and livestock of the nation. [*U. S. Dept. of Agric. General Report,* No. 76 (June 1960), pp. 1-3, 5-9, 29-45.]" (P. 18, Sunkist's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, October Term, 1961, No. 241, in the *Winckler* case.)

The question presented by the instant petition is even more important. Thousands of cooperatives who do billions of dollars of business, lawyers, organizers of cooperatives will rely on the Court of Appeals' *assertion* (Petition, p. 9) and Sunkist's *assertion* (Sunkist's Brief, p. 1) that the Supreme Court has ruled in the *Winckler* case that: Private profit making corporations that do not produce agricultural products may comprise membership of an association under section 1 of the Capper-Volstead Act.

The Court of Appeals and Sunkist's assertions are erroneous. The Supreme Court has not but should decide this important question of Federal law. In addition to our statement on page 9 of our petition, we mention that the Supreme Court's grant of certiorari in the *Winckler* case was premised on the consideration that Sunkist was "*admittedly* entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.,* 368 U.S. 813 (1961) (Our emphasis).

The question presented is extremely grave and important. Section 1 of the Capper-Volstead Act explicitly and spe-

cifically restrict persons who may act together in Capper-Volstead associations to producers of agricultural products.

The "least" that can be said respecting the Court of Appeals' decision (to borrow the language of Mr. Justice Harlan in his concurring opinion in *Federal Trade Commission* v. *Procter & Gamble Co.* (No. 342, April 11, 1967) in that the Court of Appeals' decision leaves "*lawyers, and businessmen at large as to what is expected of them in future cases of this kind.*" (Our emphasis)

II

Sunkist contends that the petition "simply raises an issue of fact." (Respondent's Brief, p. 2) This argument was not raised before the Court of Appeals. The argument defies the Capper-Volstead stipulation and it is erroneous! In the Capper-Volstead stipulation the parties stipulated to facts "deemed by each to support its *legal theory* . . . . In order to frame the *legal issue* . . . . (Our emphasis) and: "to obtain a determination by the Court of said issue." (Respondent's Brief, p. 1 of Appendix) The parties stipulated to the "*issues of law*" for the District Court to determine (Cl. Tr., p. 1802; stipulations as to the issues of law were omitted from Appendix 1 of Respondent's Brief). In order that the District Court's ruling on the Capper-Volstead issue would cover the entire period of the law action (to January 31, 1962), the parties stipulated in open court that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same to said period except for the merger of Exchange Orange and Sunkist, October 31, 1958. (District Court Pretrial Order No. 1, p. 4; Petition, p. 46, Appendix B; Cl. Tr. 1078-1083, Vol. A 25A-26A). Thus *a purely legal*

question was and is presented[2] on the Capper-Volstead issue, namely: Is a cooperative duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15 percent of its members are not producers of agricultural products, not cooperatives, but profit making enterprises?

III

Respondent argues that petitioner argues that "*every* 'member' of a Capper-Volstead cooperative must be a grower." (Respondent's Brief, p. 10)

The number of Sunkist packinghouse members that are not fruit growers, not associations of fruit growers but profit making corporations is approximately 15 percent and they supply approximately 13 percent of Sunkist's fruit. (The "Agency Associations", para. 4, Capper-Volstead Stip., Cl. Tr. 1793; p. 4 Appendix, Respondents Brief).

Such amounts are not *de minimis*. If 15 percent of a cooperatives' members need not be producers of agricultural products, why not 50 percent—or 100 percent? Such a construction of section 1 of the Capper-Volstead Act would nullify the specific mandate of Congress that only "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . ."

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[2] *Schadle* v. *Miller*, 131 Ind. App. 298, 162 N.E.2d 702 (1959); *1165 Fifth Ave. Corp.* v. *Alger*, 288 N.Y. 67, 41 N.E.2d 461 (1942); *Landy* v. *First Nat'l Bank and Trust Co. of Tulsa* (Okla.) 368 Pac.2d 987 (1962); *Rist* v. *Westhomer Oil Co.* (Okla.) 385 Pac.2d 791 (1963); *In re, Scott's Will*, 293 N.Y.S. 126, 249 App. Div. 542, aff'd in re *Central Hanover Bank & Trust Co.*, 274 N.Y. 538, 10 N.E.2d 538 (1937); *White* v. *United States*, 48 F.2d 178 (10th Cir. 1931); *Perry* v. *Wiggins*, 57 F.2d 822 (8th Cir. 1932), *cert. denied.* 287 U.S. 609 (1932).

IV

Sunkist contends that because the "Agency Association" packinghouse members buy their fruit from growers on a fixed fee, plus cost basis (and thus do not assume the risk of price changes) they somehow escape the requirements of the Capper-Volstead that members of cooperatives must be producers of agricultural products. (Sunkist's Brief, pp. 8, 9). Such argument is idle. The profits of these corporate packinghouse members under such purchases are as assured as under cost plus government contracts. Such contracts hardly convert profit making enterprises into producers of agricultural products.

V

Sunkist argues that it is "worthy of note" that we have not attacked Sunkist's Capper-Volstead qualification on the ground that Sunkist's District Exchanges are Sunkist members and they are not fruit growers and "cooperative associations" are Sunkist members and they are not growers. (Respondent's Brief, p. 12)

The District Exchanges represent the citrus packinghouses associated with it and are "conduits of communication and representation between the local packinghouse Association and Sunkist" (See Capper-Volstead Stipulation at pp. 12, 13, Appendix 1, Respondent's Brief; see also the *Winckler* case, 370 U.S. at p. 21. The Cooperative Associations are composed of growers (see paragraph 2, Capper-Volstead Stipulation, p. 3, Appendix, Respondent's Brief). We deemed that associations of growers duly organized under section 1 of the Capper-Volstead Act could properly be members of cooperatives. See *Winckler* case, 370 U.S. at p. 29. The class of packinghouse members petitioner is concerned with are the so-called "*Agency Associa-*

tions'' who are not producers of agricultural products, not cooperatives but profit making enterprises. This class of membership was not of record in the *Winckler* case. In Sunkist's Brief on the writ of certiorari to the Supreme Court in the *Winckler* case it was represented that *all* Sunkist packinghouses were grower associations and this representation was accepted by the Court in the *Winckler* case (See Petition, pp. 13-15).

VI

Sunkist argues that because section 1 of the Capper-Volstead Act permits associations and members to make the necessary contracts and agreements to affect the purposes of the association, growers "may contract with *others* to obtain the necessary services and facilities to accomplish the authorized activities." (Respondent's Brief, p. 11. (Our emphasis) Assuming such is the case, such right does not convert these *"others"* into producers of agricultural products and qualify them for membership in cooperatives. Such provision does not negate the explicit language of section 1 of the Capper-Volstead Act that members of cooperatives must be fruit growers. And the so-called "Agency Association" members are admittedly *not* fruit growers.

VII

The dissenting judge of the Court of Appeals correctly construed the majority decision of the Court as inconsistent with the Supreme Court's decision in *United States* v. *Borden Co.,* 308 U.S. 188 (1939). The quotation by the dissenting judge from the Borden case (Petition, p. 42) demonstrates this:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products* . . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products . . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 84 L. Ed. 181, 60 Sup. Ct. 182 (1939) (Emphasis supplied)."

It is stipulated in the instant case that the so-called Agency Association members of Sunkist "do not qualify as . . . cooperative associations under section 1 of the Capper-Volstead Act" (Capper-Volstead Stipulation, para. 4, p. 4, Appendix, Respondent's Brief). *Hence, they are admittedly not entitled to the exemption from the antitrust laws accorded to agricultural cooperatives.*

VIII

On page 14 of its brief, respondent admits that the Agency Association packinghouses are Sunkist members but argue that membership of a cooperative under California statutes and membership "for the purposes of the Capper-Volstead Act are quite different things." (Respondent's Brief, p. 14) Whatever may be membership requirements of non-profit corporations under California statutes, one thing is indisputable: The pertinent membership requirement under section 1 of the Capper-Volstead Act is: Members must be "engaged in the production of agricultural products." Respondent's brief is an able effort to render this requirement meaningless.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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J. EDWARD JOHNSON,
RICHARD A. PERKINS.